No. 48865-5-II

Court of Appeals, Div. II,
of the State of Washington

State of Washington,

Respondent,

v.

Pedro Godinez, Jr.,

Appellant.

Reply Brief of Appellant

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1. Reply to Respondent's Statement of the Case

The State's Brief of Respondent relates extensive facts outside of the record designated for this appeal. Because this second appeal relates only to the resentencing, Godinez designated clerk's papers and verbatim reports relating only to the resentencing and the original sentencing, for comparison. The State never objected to Godinez's limited designation. Nevertheless, the State has now seen fit to cite to a record that has not been designated and has not been shared with Godinez's counsel.

The story told by the State goes far beyond anything set forth in the trial court's findings and conclusions and far beyond the facts set forth by this Court in its opinion on the first appeal. Because this second appeal is premised on an assumption that the jury's findings were supported by substantial evidence, the extraneous facts related by the State are irrelevant to this Court's analysis of the issues presented by Godinez. This Court should disregard the State's Statement of the Case as outside the record.

2. Argument

2.1 Godinez's appeal is not barred.

As a threshold matter, the State argues that Godinez has waived his right to appeal the exceptional sentence because he

did not do so in his first appeal. The State cites *State v. Mandanas*, 163 Wn. App. 712, 716, 262 P.3d 522 (2011), which states as a general rule that a defendant may not raise an issue on a second appeal that could have been raised on the first appeal. However, there is a more specific rule that applies to resentencing: "the defendant may raise sentencing issues on a second appeal if, on the first appeal, the appellate court vacates the original sentence or remands for an entirely new sentencing proceeding." *State v. Toney*, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). *Toney* has not been overruled.

Just as in *Toney*, the Court on Godinez's first appeal unequivocally remanded for an entirely new sentencing proceeding: "We reverse Godinez's sentence and remand for resentencing." *State v. Godinez*, 191 Wn. App. 1043, 2015 WL 9036740, at *6 (2015). The trial court conducted an entirely new, adversarial sentencing proceeding. RP 20-36. The current appeal arises from that new sentencing proceeding, not from the first sentencing proceeding. Godinez could not have raised in his first appeal the errors committed by the trial court in the second sentencing proceeding. This Court should address the issues Godinez has raised on appeal.

2.2 The exceptional sentence is not justified by the written findings of fact and conclusions of law.

This Court may reverse an exceptional sentence if the sentencing court's reasons do not justify an exceptional sentence. RCW 9.94A.585. The appellate court reviews the trial court's reasons de novo based on the written findings of fact and conclusions of law. *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015); *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

Here, the trial court's written findings are insufficient to enable any meaningful review. In order to impose an exceptional sentence, the trial court must find that there are "substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Here, the trial court's findings do not describe how the aggravating circumstances were "substantial and compelling" or how those aggravators justified an exceptional sentence. The findings are entirely devoid of reasoning. They provide no information that is of any use to the parties, to this Court, or to the public. Allowing such useless findings to stand in this case would be no different from allowing the trial court to enter no written findings at all.

The State complains about the "post-*Blakely* oddity" of requiring the trial court to make findings of fact based on aggravators that must first be found by a jury. The State

wonders what a trial judge is expected to do when the statute and relevant case law expects the judge to enter written findings of fact, but a judge is not permitted to make independent factual findings in support of an aggravator.

The State has answered its own question in another pending case,[1] where it argued in favor of the correct procedure in this situation:

> The trial court included in its findings that the jury returned a special verdict unanimously finding the Wellers' conduct during the commission of the crimes manifested deliberate cruelty to the victims… The trial court then outlined the trial testimony … "At trial [various witnesses] testified that [facts witnesses testified to]." These "findings" only outline the trial testimony to make it clear the trial court found there were substantial and compelling reasons to give an exceptional sentence based on the evidence presented at trial.
>
> This finding by the trial court of substantial and compelling reasons to justify an exceptional sentence is required by statute. As a trial court exceeds its authority in imposing an exceptional sentence when it relies upon reasons that are not substantial or compelling, it is imperative that the trial court make a finding as to whether the jury's finding is supported by evidence and whether the facts of the case create substantial and compelling reasons to justify the sentence. *See State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001).

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[1] *State v. Weller*, COA No. 48056-5-II, cited by the State in Br. of Resp. at 11.

> A trial court can be presumed to be aware that its imposition of an exceptional sentence will be reviewed with scrutiny by the appellate courts. *See id.* (stating that appellate courts must determine whether a sentencing judge's articulated reasons justify imposition of an exceptional sentence). It is therefore reasonable, and in fact prudent, for a trial court to specifically articulate its reasoning in imposing such a sentence…

State v. Weller, COA No. 48056-5-II, Br. of Resp. at 5-7 (paragraphing added).

Godinez agrees and adopts this argument as his own. It is not only prudent, but required, for the trial court to not only set forth the special verdict of the jury finding the aggravators beyond a reasonable doubt, but also to set forth such trial testimony as would support the trial court's conclusion that the aggravator creates substantial and compelling reasons to justify an exceptional sentence.

Simply setting forth the jury verdicts with a formulaic conclusion that the aggravator creates substantial and compelling reasons eliminates any ability of this Court to review de novo the reasons supporting the exceptional sentence. Here, the trial court's formulaic findings and conclusions do not reveal the trial court's reasons, leaving this Court with nothing to review. Where written findings are required, they must be such as will enable meaningful review by this Court.

Godinez is not asking that trial courts engage in "judicial fact finding." Rather, Godinez agrees with the State's arguments in *Weller*. The findings that are required are not "judicial fact finding" but rather are a trial court's efforts to carefully outline how the aggravators found by the jury create substantial and compelling reasons to legally justify an exceptional sentence. *See State v. Weller*, COA No. 48056-5-II, Br. of Resp. at 8.

Godinez is also not seeking a "proportionality" analysis. Rather, Godinez seeks to have the proper standard of review applied. It is not enough that the jury found deliberate cruelty and lack of remorse; the trial court must additionally find that the aggravating factors were substantial and compelling reasons justifying an exceptional sentence. "While the jury must find the facts supporting an exceptional sentence, the court must determine whether the facts found were sufficient to warrant an exceptional sentence." *See State v. Mann*, 157 Wn. App. 428, 441–42, 237 P.3d 966 (2010). On this record, it is impossible for this Court to review de novo the trial court's determination that an exceptional sentence was justified. As argued in the opening brief, Godinez's deliberate cruelty and lack of remorse were not so egregious as to justify an exceptional sentence. This Court should reverse and remand for resentencing.

2.3 The trial court abused its discretion in imposing an excessive exceptional sentence based on unreasonable or untenable grounds.

The trial court, in effect, ignored the decision of this Court in the first appeal, re-imposing "essentially the same sentence" as it had imposed at the first sentencing under an erroneous offender score calculation. RP 31. The trial court itself observed that nothing had changed as a result of the appeal except for the correction of the offender score. RP 29-30. The reasonable reaction to that change would have been to reduce the sentence in proportion to the reduced standard ranges.

The only basis for the length of the trial court's original sentence were the erroneous standard ranges. The trial court never offered any other justification for the original 607.75 month sentence. At resentencing, the trial court did not offer any other justification for imposing "essentially the same sentence." There were no tenable grounds for the 600 month exceptional sentence imposed at resentencing.

Had the trial court used the correct offender score at the original sentencing, the exceptional sentence would have been 565.5 months. The trial court reasoned that nothing had changed since the original sentencing. RP 29-30. However, the entire basis for the length of the sentence had changed! The trial court's refusal to recognize this fact was manifestly unreasonable. This Court should reverse.

3. Conclusion

The trial court's reasoning does not justify an exceptional sentence, and the sentence imposed was excessive. This Court should reverse and remand for resentencing within the standard ranges.

Respectfully submitted this 21st day of February, 2017.

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I certify, under penalty of perjury under the laws of the State of Washington, that on February 21, 2017, I caused the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 21st day of February, 2017.

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